

Letter of Findings Number: 04-20130270
Use Tax
For Tax Years 2010 to 2011

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ISSUE

I. Use Tax–Bulk Gasoline.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-5-8; IC § 6-8.1-5-1; Brambles Industries, Inc. v. Indiana Dep't of State Revenue, 892 N.E.2d 1287 (Ind. Tax Ct. 2008); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Miles, Inc. v. Indiana Dep't of State Revenue, 659 N.E. 2d 1158 (Ind. Tax Ct. 1995).

Taxpayer protests the imposition of use tax on certain of its gasoline purchases.

STATEMENT OF FACTS

Taxpayer is an Indiana retail merchant in the business of selling new and previously owned vehicles. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had neither paid the proper amount of sales tax at the time of the purchases nor remitted use tax to the Department. The Department therefore issued proposed assessments for the additional use tax and interest due for the 2010-2011 tax years. Taxpayer protests the imposition of use tax on gasoline that it "allocates" to its previously owned cars. An administrative hearing was held, and this Letter of Findings results. Further facts will be supplied as necessary.

I. Use Tax–Bulk Gasoline.

DISCUSSION

All tax assessments are prima facie evidence that the Department's claim for the tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). In general, all purchases of tangible personal property are subject to sales and/or use tax. An exemption from use tax is granted for transactions where sales tax was paid at the time of the purchase pursuant to IC § 6-2.5-3-4. In certain circumstances, additional enumerated exemptions from sales and/or use tax are available.

The Department determined that Taxpayer had purchased bulk gasoline without paying sales tax at the time of purchase of the gasoline or remitting use tax to the Department. Therefore, the Department assessed use tax on the gasoline.

Taxpayer asserts that the portion of its bulk gasoline purchases—that is "allocated" to each of the previously owned cars it sells—is not subject to use tax because "it would be double taxation." Taxpayer maintains that the purchaser of the previously owned car is paying sales tax on the gasoline when the purchaser pays sales tax on the total price of the car because Taxpayer has included the price of the gasoline in the total purchase price charged for the car. Taxpayer states that it purchases gasoline in bulk, purchases previously owned vehicles, allocates \$50 of gasoline to each of the previously owned vehicle it purchases for resale, and includes the \$50 amount in the cost of the previously owned vehicle.

The Department refers to Brambles Industries, Inc. v. Indiana Dep't of State Revenue, 892 N.E.2d 1287 (Ind. Tax Ct. 2008). Here a manufacturer that was seeking the "resale exemption" under IC § 6-2.5-5-8 for pallets—by maintaining that "the price of pallet was incorporated into the price of their products"—was denied the exemption, the Tax Court explained, as follows:

Indiana Code § 6-2.5-5-8 exempts from tax "[t]ransactions involving tangible personal property . . . if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business [.]" Ind. Code Ann. § 6-2.5-5-8(b) (West 2001) (amended 2003). See also 45 Ind. Admin. Code 2.2-5-15(a) (2001). This Court has previously explained that in order to show entitlement to the sale for resale exemption, the taxpayer must demonstrate that it received itemized consideration for the item. See Miles, Inc. v. Indiana Dep't of State Revenue, 659 N.E.2d 1158, 1165 (Ind. Tax Ct. 1995) (discount coupons inserted in boxes were not resold because customers did not pay itemized amount for them); Indiana Bell Tel. Co. v. Indiana Dep't of State Revenue, 627 N.E.2d 1386, 1389 (Ind. Tax Ct. 1994) (telephone directories, the cost of

which was built into customers' monthly bills, were not resold for purposes of the exemption because their cost was not itemized in the bills); USAir, Inc. v. Indiana Dep't of State Revenue, 542 N.E.2d 1033, 1035-36 (Ind. Tax Ct. 1989) (holding that meals provided on airline's flights were not resold because there was nothing in the price of the ticket to reflect the price of the food). "Moreover, separate bargaining must occur between the customer and the taxpayer for the exchange of that particular item." Miles, 659 N.E.2d at 1165. See also Greensburg Motel Assocs. v. Indiana Dep't of State Revenue, 629 N.E.2d 1302, 1305-06 (Ind. Tax Ct. 1994) (holding that consumable and non-consumable items provided in hotel guest rooms were not resold because the hotel's customers did not bargain for those items).
Brambles, 892 N.E.2d . at 1289-90.

Based on the above, the purchase and use of the gasoline for Taxpayer's used vehicles purchased for resale does not qualify for exemption from sales or use tax. In the instant case, Taxpayer is not selling the gasoline because there is neither a separate itemized consideration for the gasoline nor a separate bargaining for the gasoline. Since Taxpayer did not pay sales tax at the time of the purchase of the gasoline, use tax is properly imposed. As a result, Taxpayer has not met its burden to prove the proposed assessment wrong, as provided by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is respectfully denied.

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